186 (2)

No. 10-1009

In the
Supreme Court of the United States

DONNIE E. JOHNSON,

Petitioner,

v.

RICKY BELL, Warden,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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April 19, 2011

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CAPITAL CASE

QUESTION PRESENTED

What legal standard governs the determination whether a movant alleging fraud under Federal Rule of Civil Procedure 60(b) is entitled to an evidentiary hearing to resolve disputed questions of material fact?

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OPINION BELOW

The opinion of the court of appeals that is the subject of this petition is published at 615 F.3d 333. (Pet. App. 1a). The order of the district court denying petitioner's Fed. R. Civ. P. 60(b) motion (Pet. App. 27a) is unreported.

STATEMENT OF JURISDICTION

The judgment and opinion of the court of appeals were filed on May 17, 2010. (Pet. App. 1a). The court denied rehearing on September 10, 2010. (Pet. App. 26a). On November 23, 2010, Justice Kagan granted petitioner's request to extend the time for filing a certiorari petition to and including February 7, 2011. Petitioner filed his petition for writ of certiorari on February 7, 2011. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Federal Rule of Civil Procedure 60(b) provides:

> **(b) Grounds for Relief from a Final Judgment, Order, or Proceeding.** On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
>
> * * *
>
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

* * *

(6) any other reason that justifies relief.

(c) Timing and Effect of Motion.

(1) Timing. A motion under Rule 60(b) must be made within a reasonable time – and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

(d) Other Powers to Grant Relief. This rule does not limit a court's power to:

* * *

(3) set aside a judgment for fraud on the court.

Twenty-eight U.S.C. § 2244 provides, in pertinent part:

(b) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

STATEMENT OF THE CASE

1. Petitioner was indicted in March 1985 for the first-degree murder of his wife, Connie Johnson. He was subsequently convicted as charged and sentenced to death. The Tennessee Supreme Court affirmed the judgment on December 21, 1987. *State v. Johnson*, 743 S.W.2d 154 (Tenn. 1987). This Court denied Johnson's

petition for a writ of certiorari on April 4, 1988. *Johnson v. Tennessee*, 485 U.S. 994 (1988). The Tennessee Supreme Court summarized the evidence at trial in its opinion on direct appeal.

> The homicide occurred on December 8, 1984. For three or four years prior to that time, appellant had been the manager and a salesman for a camping equipment center in Memphis. His wife had also worked at the center for a period of twelve to eighteen months, but she was not so employed at the time of her death. Appellant had adopted a daughter of his wife by a former marriage, and the couple had a son who was about four years old at the time of the trial.
>
> There had been some difficulties in the marriage, and appellant's wife had from time to time threatened to separate from him. There is no evidence that appellant had ever seriously injured his wife prior to December 1984. He had admittedly been unfaithful to her although he denied involvement with any other woman at the time of his wife's death. More than a year and a half prior to her death, Mrs. Johnson had purchased a policy of life insurance in which appellant was named as primary beneficiary and her sister as contingent beneficiary. Following the death of Mrs. Johnson, both her sister and appellant made claims for the policy proceeds of fifty thousand dollars.
>
> Mrs. Johnson suffered a most terrible death by suffocation. From this record there is no question but that appellant or one Ronnie

McCoy murdered her. Appellant did not testify until the sentencing hearing. At the guilt hearing McCoy testified that appellant killed Mrs. Johnson at appellant's place of employment in the early evening of Saturday, December 8, 1984, the time of death being estimated at between 6:30 and 7 p.m.

McCoy was a prisoner on work release at the place where appellant was employed. Appellant transported McCoy to and from work each day, checking him in and out at the Shelby County Penal Farm near Memphis. Appellant did so on the date of the homicide. McCoy and two employees of the penal farm testified that appellant transported McCoy to the penal farm after work on that date and checked him in at about 7:17 p.m.

McCoy testified that he left appellant and Mrs. Johnson alone in the office of the camping center while McCoy attended to some chores preparatory to leaving the place of business for the day. He was gone for some ten to fifteen minutes, and when he returned to the office, he testified that he found Mrs. Johnson strangled or suffocated to death.

It is not necessary here to give the horrible details of the manner of her death. It is sufficient to state that a large plastic garbage bag had been forced into her mouth, resulting in her strangulation and asphyxiation. She bled from the nose and ears, and traces of blood were found on a couch in the office where her death occurred. There was testimony that she would

have been conscious during the terrifying ordeal and that from one to four minutes would have elapsed before she expired.

Appellant did not testify until the sentencing hearing after he had already been found guilty of murder in the first degree. At that time he denied killing his wife and attempted to place responsibility upon McCoy. He testified that he left McCoy and Mrs. Johnson alone in the sales office for a few minutes. He had given Mrs. Johnson about $250 earlier that morning and about $200 again that afternoon for purposes of Christmas shopping. It was his contention that McCoy tried to rob Mrs. Johnson and killed her in the process.

Appellant and McCoy each testified to being afraid of the other. In all events, however, they collaborated, willingly or otherwise, in transporting the body of Mrs. Johnson in her 1981 Ford van from the sales office to a shopping center a few miles away. They also placed inside the van her broken spectacles, her shoes, her coat and some earrings which had become dislodged in her struggle for breath. They parked the van on the edge of a large shopping center and left it there. Each testified that the other drove the van from the office to the shopping center. Both agreed that appellant then transported McCoy to the penal farm in appellant's pick-up truck. McCoy testified that he had driven the truck to the shopping center following appellant who was driving the van.

In all events the van was left on the parking lot overnight. A security officer at one of the retail stores noted its presence, and in the early morning hours of December 9 he placed a ticket on the vehicle but did not open it.

Appellant called his employer near 11 a.m. on the morning of Sunday, December 9, pretending to make inquiry about his wife. He said that she had not come home on the previous evening and had not picked up their children from the home of appellant's brother. Appellant had spent the night at the sales office and early on the morning of December 9 had delivered a trailer to a customer at a camp site. Upon returning from that trip, he placed the call to his employer.

The employer, Mr. James Force, and his wife were advised by appellant that Mrs. Johnson was supposed to have gone Christmas shopping on the previous evening. Mr. and Mrs. Force agreed to assist in finding her. In the course of doing so they found her van, which was well known to them, at the shopping center. Upon opening the van, they found the lifeless body of Mrs. Johnson. They immediately reported to security personnel at the mall. Investigating police officers arrived in a short time.

Both Mr. and Mrs. Force and appellant gave statements to the police. Appellant denied any involvement in the death of his wife. He made no mention of having known that McCoy killed her and denied that he had any knowledge of

when or how her van had reached the premises of the shopping mall.

In addition to the direct testimony of McCoy, there was other strong evidence implicating appellant in the homicide. Appellant had called one Barry Pfister at about 9 p.m. on Saturday evening to inquire about his wife. He told Pfister that he and his wife were coming to the sales office to try to work out their differences. He asked Pfister to observe if and when Mrs. Johnson arrived and to advise her that appellant was on his way.

At some time during the evening, appellant called on a former girl friend, Debbie McKee, who was working at a local motel. She had called him earlier in the evening, and he drove to her place of employment at some time between 7:30 and 8 p.m. Appellant admitted to the police that he had previously had an affair with Ms. McKee but denied that there was any sexual relationship between them at the time of the homicide.

When Mrs. Johnson's van was opened by police at the shopping mall, it did not contain ignition keys. Mrs. Johnson's set of ignition keys, together with her hairbrush and some other personal items, were found behind the seat of appellant's truck when it was seized following the discovery of Mrs. Johnson's body. Sisters of Mrs. Johnson testified that they could identify the keys which were the only set of keys to the van which Mrs. Johnson had.

> The only witnesses called by appellant at the guilt phase were an insurance agent who testified about the life insurance claims made under Mrs. Johnson's policy and one Paul Adams, manager of a tent shop at the camping center. He testified that appellant had come to the door of his shop at about 7 p.m. on Saturday, December 8.

Johnson, 743 S.W.2d at 155-57.

2. On June 17, 1988, Johnson filed his first petition for post-conviction relief in the state trial court. Following an evidentiary hearing that took place over three days and involved 30 witnesses, the trial court denied relief. The Tennessee Court of Criminal Appeals affirmed the trial court's judgment on June 26, 1991. *Donnie E. Johnson v. State*, No. 61, 1991 WL 111130 (Tenn. Crim. App. June 26, 1991), *app. denied* (Tenn. Mar. 8, 1993). The Tennessee Supreme Court denied petitioner's application for permission to appeal on March 8, 1993. *Id.*

Johnson filed a second petition for post-conviction relief while the trial court still had the first petition under advisement. The trial court denied relief. The Tennessee Court of Criminal Appeals initially reversed the judgment of the trial court and remanded the case for further proceedings, *Donnie Edward Johnson v. State*, No. 02C01-9111-CR-00237, 1994 WL 90483 (Tenn. Crim. App. Mar. 23, 1994), but the Tennessee Supreme Court granted the State's application for permission to appeal and remanded the case to the Court of Criminal Appeals for reconsideration in light of its decision in *House v. State*, 911 S.W.2d 705 (Tenn. 1995) (clarifying meaning of statutory waiver provision

in Tennessee Post-Conviction Procedure Act). *Donnie Edward Johnson v. State*, No. 02C01-9111-CR-00237, 1995 WL 603159 (Tenn. 1995). On remand, the Court of Criminal Appeals affirmed the judgment of the trial court denying relief on petitioner's second petition for post-conviction relief. *Donnie E. Johnson v. State*, No. 02C01-9111-CR-00237, 1997 WL 141887 (Tenn. Crim. App. Mar. 27, 1997), *app. denied* (Tenn. Sept. 8, 1997). On September 8, 1997, the Tennessee Supreme Court denied petitioner's application for permission to appeal. *Id.*

3. On November 14, 1997, petitioner filed a petition for federal habeas corpus relief. Among the claims raised in petitioner's initial habeas proceeding was an allegation that the prosecution knowingly presented false testimony at the guilt phase of petitioner's trial through a key witness, Ronnie McCoy, that no "deal" existed in exchange for his testimony and, further, improperly withheld evidence of such a deal. On February 28, 2001, the district court issued a memorandum opinion and order granting the Warden's motion for summary judgment. The district court found that petitioner had not raised the claim in the Tennessee state courts; that he had provided no explanation concerning his "discovery" of any alleged "deal" that would support a finding of good cause for his failure to develop the claim in state court; and that petitioner had failed to present "any credible evidence" that the State had entered into a "deal" for McCoy's testimony. (Pet. App. 62a). The district court observed that the respondent submitted affidavits from both McCoy and the prosecutor denying the existence of any deal in exchange for McCoy's testimony, concluding, "[t]he various ambiguous bits of evidence put forward by petitioner are not sufficient to

undermine the credibility of the unambiguous sworn denials of every individual with contemporaneous personal knowledge concerning the matter." (Pet. App. 66a). The court concluded, "[P]etitioner has no credible claim that the prosecutors withheld evidence or suborned perjury. An analysis of the factual record indicates that this claim has been concocted out of commonplace inconsistencies in the testimony and documentary evidence." (Pet. App. 59a).

Both the district court and the Sixth Circuit denied a certificate of appealability on petitioner's *Brady* claim. The Sixth Circuit affirmed the judgment on appeal, and this Court denied a petition for writ of certiorari. *Johnson v. Bell*, 344 F.3d 567 (6th Cir. 2003), *cert. denied*, 541 U.S. 1010 (2004).

4. On October 13, 2004, approximately one month before his scheduled execution date, petitioner filed a motion for equitable relief and/or for relief from judgment in the district court, again asserting that the prosecution had engaged in misconduct at trial by not revealing to defense counsel that it had granted a key witness, Ronnie McCoy, a deal in exchange for his testimony. Petitioner further alleged that relief from the federal habeas judgment was warranted, because the State perpetrated a fraud upon the district court by submitting false affidavits from McCoy and the trial prosecutor denying the existence of a deal. The district court issued a stay of execution pending resolution of the Rule 60 motion. Following this Court's decision in *Gonzalez v. Crosby*, 545 U.S. 524 (2005), the district court denied petitioner's motion and subsequently denied petitioner's motion to alter or amend judgment. As to petitioner's fraud claim, the district court concluded that it "fails on many levels."

(Pet. App. 50a). First and foremost, the court found that petitioner had failed to "allege, much less actually demonstrate, that [counsel for respondent] knowingly submitted false affidavits before [the district court] during habeas proceedings," an essential component of a fraud claim under the prevailing Sixth Circuit rule in *Demjanjuk v. Petrovsky*, 10 F.3d 338 (6th Cir. 1993) (Pet. App. 51a). The court further found that, "even if the Court were to concur with Petitioner regarding the conduct which he deems fraudulent, such conduct was not directed to the judicial machinery itself" and would thus be insufficient to justify relief from the habeas judgment. (Pet. App. 51a).

> [T]he Court cannot consider the conduct complained of by Petitioner, the submission of allegedly false affidavits by two witnesses to the prior habeas proceedings, conduct which subverted the Court's integrity during those proceedings, particularly where Petitioner cannot show that counsel for Respondent knowingly submitted any such false affidavits.

(Pet. App. 51a-52a).

In sum, the district court found no allegation or evidence whatsoever to support petitioner's claim of fraud in the initial habeas proceedings. But even taking his allegations as true, the district court concluded that they failed to rise to the level of fraud in any event.

Petitioner appealed to the United States Court of Appeals for the Sixth Circuit, which affirmed the district court's judgment in the decision at issue in the instant petition. In its opinion, the Sixth Circuit

concluded that, while there is "some evidence" that McCoy received favorable treatment, "petitioner has not come forward with clear and convincing evidence that the prosecution presented intentionally false material to the district court, a prerequisite to establish a viable fraud on the court claim" under *Demjanjuk*. (Pet. App. 12a-13a).

ARGUMENT

CERTIORARI IS NOT WARRANTED, BECAUSE ANY CONFLICT OVER THE LEGAL STANDARD FOR ALLOWING AN EVIDENTIARY HEARING ON A FRAUD CLAIM UNDER RULE 60(b) IS NOT IMPLICATED HERE, WHERE PETITIONER'S SHOWING WAS INADEQUATE UNDER ANY STANDARD, AND THE PRIOR HABEAS JUDGMENT IS SUSTAINED BY AN ALTERNATIVE PROCEDURAL BASIS.

Petitioner asserts that a writ of certiorari is warranted in this case to resolve a circuit conflict over the proper legal standard for allowing an evidentiary hearing when a movant alleges fraud under Fed. R. Civ. P. 60(b). Specifically, he contends that certain circuits hold that a movant is entitled to a hearing if he makes a "colorable claim" of fraud, while others hold that a district court does not abuse its discretion in denying an evidentiary hearing unless the movant produces "clear and convincing" evidence of fraud. Here, however, petitioner's complaint and supporting documents were aimed solely at alleged misconduct of the McCoy and the trial prosecutor themselves in submitting allegedly perjurious affidavits; he presented no evidence of any improper collusion or other misconduct on the part respondent's counsel in

this habeas case. Indeed, the district court found that, "[a]t no point in his motion for relief does Petitioner so much as allege, much less actually demonstrate, that specifically Respondent's counsel knowingly submitted false affidavits before this Court during habeas proceedings." (Pet. App. 51a). In the absence of any such evidence, petitioner's argument is little more than a rehash of his *Brady* claim, an act specifically prohibited by 28 U.S.C. § 2244(b)(1).[1] Thus, under either evidentiary standard, the summary dismissal of petitioner's motion was proper because he presented no evidence to support the essential component of such a claim – allegedly fraudulent conduct on the part of an officer of the court. *See Demjanjuk*, 10 F.3d at 348. And even if that were not the case, the district court's prior habeas judgment is independently sustained by its alternative finding that petitioner's *Brady* claim was barred by procedural default, a conclusion that is undisturbed regardless of the existence of any alleged deal between the State and Ronnie McCoy. Certiorari is not warranted.

While couching his argument in terms of a fraud-on-the-court claim, petitioner does little more than re-assert the merits of his original *Brady* claim – that the prosecution withheld evidence of a deal with Ronnie

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[1] In *Gonzalez v. Crosby*, 545 U.S. 524 (2005), this Court addressed the circumstances under which a Rule 60(b) motion may be considered in the habeas context without the need to satisfy the requirements of 28 U.S.C. § 2244 governing successive habeas applications. The Court made clear in *Gonzalez* that a Rule 60(b) motion that attacks the federal court's previous resolution of a claim on the merits is effectively indistinguishable from alleging that the movant is entitled to habeas relief and thus barred under the successive-petition prohibition of § 2244(b).

McCoy in exchange for his testimony at petitioner's trial – a claim rejected by the district court in petitioner's initial habeas proceeding on both procedural and substantive grounds. Petitioner presented not a scintilla of evidence in the district court suggesting that the State Attorney General knowingly sponsored false evidence before the district court, a requirement for a claim of fraud under *Demjanjuk* and a defect specifically highlighted by the district court in its order denying relief from the judgment.[2] (Pet. App. 50a-51a).

Furthermore, petitioner's effort to undermine the district court's merits determination does nothing to overcome its alternative finding that the claim is also barred by procedural default, a finding which independently sustains the habeas judgment notwithstanding the existence of any deal. In his original habeas proceeding, Johnson alleged that the prosecution elicited false testimony from Ronnie McCoy at trial that no "deal" existed in exchange for his testimony and, further, improperly withheld evidence of such a deal. The district court found that the petitioner failed to raise the issue in the Tennessee state courts, that he had provided no explanation

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[2] The Sixth Circuit has defined fraud on the court as conduct: (1) on the part of an officer of the court; (2) that is directed at the judicial machinery itself; (3) is intentionally false, willfully blind to the truth, or is in reckless disregard for the truth; (4) is a positive averment or a concealment when one is under a duty to disclose; and (5) deceives the court. *Demjanjuk v. Petrovsky*, 10 F.3d 338, 348 (6th Cir. 1993). A movant bears the burden of proving the existence of fraud on the court by clear and convincing evidence. *Info-Hold, Inc. v. Sound Merch., Inc.*, 538 F.3d 448, 454 (6th Cir. 2008).

concerning his "discovery" of any alleged "deal" that would support a finding of good cause for his failure to develop the claim in state court, and that he failed to present "any credible evidence" that the State had entered into a "deal" for McCoy's testimony. (Pet. App. 62a-63a). The district court specifically rejected petitioner's attempts to excuse his default by invoking prosecutorial misconduct, noting that, during petitioner's state post-conviction proceeding, the prosecutor offered to testify as to the existence of a deal, but post-conviction counsel declined the offer. (Pet. App. 62a). Because the habeas judgment is fully sustained by the district court's procedural default determination, the legal question presented here is not dispositive.

Finally, in its original habeas judgment, the district court concluded that petitioner's *Brady* claim was "totally lacking in substantive merit." (Pet. App. 64a). The court observed that the prosecutor submitted affidavits from both McCoy and the prosecutor denying the existence of any deal in exchange for McCoy's testimony, concluding, "[t]he various ambiguous bits of evidence put forward by petitioner are not sufficient to undermine the credibility of the unambiguous sworn denials of every individual with contemporaneous personal knowledge concerning the matter." (Pet. App. 661). Both the district court and the Sixth Circuit denied a certificate of appealability on the *Brady* claim.

In his Rule 60(b) motion, petitioner asserted that both McCoy and the trial prosecutor testified falsely in the affidavits submitted in the habeas proceeding by continuing to deny the existence of a deal between the State and McCoy. In support, petitioner presented the

affidavit of Wayne Morrow, McCoy's probation officer, who asserted that McCoy's 1988 presentence report accurately reflected McCoy's statements to Morrow at that time.[3]

Petitioner here contends that he was entitled to an evidentiary hearing on his fraud claim "based on the conflicting sworn affidavits regarding the truth of McCoy's testimony." (Pet. 10). Undoubtedly, fraud on the habeas court is one example of a defect in the integrity of judicial proceeding that would be amenable to a Rule 60(b) challenge notwithstanding a prior merits determination. *Gonzalez*, 545 U.S. at 532 n.5. But petitioner's argument conflates his *Brady* and fraud claims. As to the former, further merits consideration by way of Fed. R. Civ. P. 60(b) is barred by 28 U.S.C. § 2244(b)(1) as a prohibited successive habeas application. And, on the latter, petitioner failed to make even a prima facie showing of fraud on the court, which requires that the petitioner present evidence showing that an officer of the court, *i.e.*, attorneys with the Tennessee Attorney General's office representing the respondent, engaged in fraudulent conduct. *See also* *Workman v. Bell*, 484 F.3d 837, 840 (6th Cir. 2007) (rejecting fraud-on-the-court claim after concluding that movant "offers nothing serious to show that the Attorney General sponsored the [alleged] false testimony or knew about it during the federal habeas proceeding"). Indeed, *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944), itself

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[3] In a presentence report, dated July 14, 1988, McCoy reportedly stated that he "was on work release in 1984 when he became involved in a murder case. He stated that he was granted immunity for turning state's evidence." (Pet. App. 10a).

involved an attorney's misrepresentations to the court and presented a prima facie showing of fraud on the court. *Id.* at 245. By contrast, the Court observed that mere allegations of perjury by a witness are insufficient to state a claim of fraud. *Id. See also Quality Technology Co. v. Stone & Webster Engineering Co., Inc.*, 7 F.3d 234 (6th Cir. 1993) (same); *Fierro v. Johnson*, 197 F.3d 147, 155-56 (5th Cir. 1999) (refusing to extend constructive knowledge of perjury to state's habeas attorneys merely because they were defending a conviction reliant on that perjury); *First Nat'l Bank of Louisville v. Lustig*, 96 F.3d 1554, 1573 (5th Cir. 1996) ("To establish fraud on the court, it is necessary to show an unconscionable plan or scheme which is designed to improperly influence the court and its decision.").

Petitioner's Rule 60(b) complaint did little more than challenge further the veracity of the trial prosecutor and McCoy; he presented no evidence of any improper collusion or other misconduct on the part of the Tennessee Attorney General's office in its representation of the respondent in this habeas case. In essence, his Rule 60(b) motion presented additional evidence and re-argument of the merits of his *Brady* claim, an act prohibited by 28 U.S.C. § 2244(b)(1).

Moreover, in contrast to the evidence before the Court in *Hazel-Atlas*, described by the Court as "conclusive" and "indisputable," the evidence in this case consisted of one individual's "contrasting recollection of an interview which occurred more than seventeen years ago," which in no way establishes the existence of a deal in exchange for McCoy's testimony, let alone that respondent's habeas counsel actively perpetrated a fraud on the district court. (Pet. App.

46a-47a). Under these circumstances, the district court did not abuse its discretion in summarily denying petitioner's motion for equitable relief, and the Sixth Circuit correctly affirmed the judgment of the district court.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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